

STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-29

Date issued: December 30, 1988

Requested by: Patricia L. Burke  
Burleigh County State's Attorney

- QUESTIONS PRESENTED -

I.

Whether the clerk of district court must initiate income withholding proceedings pursuant to N.D.C.C. ch. 14-09 to collect arrears when there is no longer an ongoing support obligation if the obligor has been ordered to make payment toward any outstanding arrears.

II.

Whether the clerk of district court must initiate income withholding proceedings pursuant to N.D.C.C. ch. 14-09 to collect arrears when the whereabouts of the children to be supported under a current support order are unknown, but where arrears are owed to an assignee whose whereabouts are known.

- ATTORNEY GENERAL'S OPINION -

I.

It is my opinion that the clerk of district court must initiate income withholding proceedings pursuant to N.D.C.C. ch. 14-09 to collect arrears when there is no longer an ongoing support obligation if the obligor has been ordered to make payment toward any outstanding arrears.

II.

It is my further opinion that the clerk of district court must initiate income withholding proceedings pursuant to N.D.C.C. ch. 14-09 to collect arrears when the whereabouts of the children to be supported under a current support order are unknown, but where arrears are owed to an assignee whose whereabouts are known.

- ANALYSES -

I.

Pursuant to N.D.C.C. ' 14-09-09.13, the clerk of court is obliged to commence the income withholding process "[i]f an obligor is delinquent." N.D.C.C. ' 14-09-09.10(1) defines "delinquent" as "a situation which occurs on the first working day after the day upon which a child support payment was identified as due and unpaid, and the total amount of unpaid child support is at least equal to the amount of child support payable in one month." The definition does not require that the month in question be a current month. If the child support payments are in arrears in a total amount equal to or greater than the last monthly child support obligation, a delinquency exists even if there is no ongoing support obligation.

However, under certain circumstances, it would be futile and, thus, unnecessary for the clerk to commence an income withholding process when only arrears are owed. N.D.C.C. ' 14-09-09.13(3) establishes the total amount of money to be withheld by the income payor from the obligor's income. N.D.C.C. ' 14-09-09.13(3)(b) describes the amount to be withheld with respect to arrears as follows: If an existing court order describes the amount the obligor is to pay towards any outstanding arrearage, that amount is to be withheld; in the alternative, there is no court order with respect to payment of an arrears, then the amount to be withheld is "equal to twenty percent of the obligor's current support obligation." If an obligor has no current support obligation, the amount to be withheld is twenty percent of zero dollars. Twenty percent of zero dollars is zero dollars. A wage withholding order issued for the withholding of zero dollars would be a futile act, and the law does not require that futile acts be done. Each case will, therefore, have to be considered based on its own facts. In cases where there is no current support obligation but there are arrears, the clerk is only required to initiate an income withholding process to collect the arrears when the obligor has been ordered to make payment toward these arrears.

II.

Where there is a current child support obligation but the whereabouts of the child to be supported are unknown, it is sometimes the practice of public officials to refrain from pursuing collection activities. This may be because, in cases where the obligee has not furnished the clerk with an address, it is not possible to carry out the clerk's duties to remit collection pursuant to N.D.C.C. ' 14-08-09. Under N.D.C.C. ' 14-09-09.17, the clerk may stay an existing income withholding order where transmittal of support is not possible because the obligee's location is unknown to the clerk. However, this provision of N.D.C.C. ' 14-09-09.17 would be inapplicable when a state or political subdivision is the obligee. The term "obligee" is defined to include a state or political subdivision to whom a duty of support is owed. N.D.C.C. ' 14-09-09.10(5). This "duty of support" would arise out of assignments made pursuant to N.D.C.C. " 50-09-06 and 50-09-06.1. As the clerk should not have difficulty locating the obligee when the

obligee is a state or political subdivision, no stay would be appropriate under those circumstances.

Even in cases where there has been no assignment and the location of the obligee is unknown to the clerk, N.D.C.C. ' 14-09-09.17 only becomes operative when support payments have been collected under an income withholding order, and the clerk is prevented from transmitting the support because the location of the obligee is unknown to the clerk. Until transmission of support payments is prevented, the very existence of a delinquency obliges the clerk to commence income withholding. N.D.C.C. ' 14-09-09.13.

Upon commencement of income withholding, the total amount of money to be withheld includes not only the current monthly support obligation, but some amount for arrears, whether or not an existing order describes the amount the obligor is to pay towards any outstanding arrearage. N.D.C.C. ' 14-09-09.13(3)(b). In a situation where a current monthly support obligation exists, it will always be possible to calculate some amount to be paid for application towards any arrearage. Under those circumstances, compliance with N.D.C.C. ' 14-09-09.13 would never be a futile act and the clerk would be required to initiate an income withholding proceeding.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. ' 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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Attorney General

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